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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FCP/142999

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 13, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance/Family Care, a hearing was held on October 11, 2012, at Milwaukee, Wisconsin.

The issue for determination is whether the Family Care (FC) agency properly determined that the Petitioner's level of care should be revised from a nursing home level of care to a non-nursing home level of care.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By: Megan Klackner

Milwaukee Enrollment Services  
1220 W Vliet St  
Milwaukee, WI 53205

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County. Petitioner has been enrolled in the FC program since approximately 2005. She is currently a member enrolled with the Milwaukee County Department of Family Care. Petitioner resides with her husband.

2. The Petitioner's primary diagnosis is arthritis in her hands, R hip, knees and back. She has difficulties with stairs and getting in and out of bed. She attends physical therapy sessions for her hip and back pain. She also has diagnoses of diabetes, hypertension, chronic pain, urinary incontinence and restless leg syndrome.
3. On July 18, 2012, an inter-disciplinary team (IDT) from the agency completed the Petitioner's six month review with a home visit. A long-term care functional screen (LTCFS) was reviewed with the member. Prior to this review, the Petitioner's functional eligibility had been determined to be at the nursing home level of care. The most recent screening prior to the July, 2012 review was in January, 2012.
4. On July 24, 2012, the agency updated the LTCFS from information that was gathered during the home visit. A determination was made to decrease Petitioner's level of care from nursing home to non-nursing home. Per the assessment, the Petitioner is not independent in the performance of two activities of daily living (ADLs): bathing and dressing. She is able to appropriately perform her other ADLs. The petitioner cannot safely or appropriately perform four "instrumental activities of daily living" (IADL): meal preparation, laundry and/or chores, telephone and transportation.
5. On July 25, 2012, the agency issued a Notice of Change in Level of Care to the Petitioner informing her of the change to a non-nursing home level of care.
6. On July 30, 2012, the agency issued a Notice of Decision to the Petitioner informing her that as of September 1, 2012, the Petitioner would no longer be enrolled in Family Care due to her non-nursing home level of care.
7. On August 13, 2012, the Petitioner filed an appeal with the Division of Hearings and Appeals.
8. On August 16, 2012, the agency issued a Notice of Decision to the Petitioner informing her that as of September 1, 2012, she would remain enrolled in FC. This is the result of the Petitioner's pending appeal.

### **DISCUSSION**

The FC program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults. See, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10. Whenever the local FC decides that a person is not eligible for the program, the client is allowed to file a fair hearing request, as the Petitioner did here.

In order to qualify for FC services, with certain exceptions not applicable here, a person's functioning must be such that they would otherwise require institutional care such as what is provided in a skilled nursing facility. Wis. Stat. §46.286(1)(a). Essentially, to meet the functional eligibility requirement, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

The Wisconsin Department of Health Services has made efforts to improve the statewide efficacy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience); who has been trained and met all requirements to do so by completing a Department sanctioned web-based training program, and have experience working with long term care consumers.

The screener/assessor asks the applicant, or a recipient at an annual review, questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits (as occurred here) the "Functional Screen Report" for the applicant to the Department's Division of Long Term Care. The Department then treats the Long Term Functional Screen data (or "tool") by computer programming to see if the applicant/recipient meets any of the nursing levels of care.

In the implementation of the "functional screen" process, the Department employed a statistical consultant to test the use of the "tool" (the Level of Care Functional Screen form, or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant prepared an academic report finding that the use of the functional screen resulted in a high degree of reliability and consistency. Current policy requires the Department's local agent to utilize this system. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The cross-referenced Level of Care (LOC) Functional Screen form reiterates the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities.

However, the computer program infrequently yields a result that is not consistent with state code. Wis. Admin. Code § DHS 10.33(2)(c) describes comprehensive (a/k/a nursing home) functional capacity:

(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY.

(a) Determination. Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286 (1), Stats., and this chapter, ...

(c) Comprehensive functional capacity level. A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
  - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
  - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.

The Petitioner and her daughter testified at the hearing. The Petitioner testified that she fell at home the day before. She states that it is hard to get out of bed. She testified that her condition has been getting worse. She stated that her daughter helps her to get in and out of the shower and tub. She needs assistance to do laundry 2x/week. She is unable to transport herself. She has never learned to drive and has cognitive limits preventing her from driving. Her daughter helps her to dress. She testified that she has not been to the YMCA for 1 – 2 months due to back pain. Petitioner's daughter testified that in addition to helping her in and out of the shower or tub and assistance with laundry, she also helps with household cleaning, caring for the Petitioner's hair, preparing meals, medication reminders. She helps her mother with dressing but not every day. She is not at her mother's home every day. She spends most weekends there. She estimates that she is at her mother's home 4 – 5 times/week. She testified that she needs to be there to help care for her dad as well. The Petitioner further testified that her conditions have not improved but have become worse since the last screen in January, 2012.

As evidenced by the July, 2012 screen, the Petitioner falls within the comprehensive functional capacity definition – she cannot safely/appropriately perform two ADLs and more than one IADL (item 2 above). Thus, per code, she meets the comprehensive/nursing home level of care. Therefore, although the screening personnel followed their DHS instructions correctly, the discontinuance of the Petitioner's FCP eligibility due to failure to meet the level of care requirement was incorrect. This decision is in accord with prior decisions FCP-11/113325 (Wis. Div. of Hearings & Appeals October 26, 2010, ALJ Schneider)(DHS), FCP-44/115906 (Wis. Div. of Hearings & Appeals April 5, 2011, ALJ Schneider)(DHS), and Rehearing FCP/130316 (Wis. Div. of Hearings & Appeals September 29, 2011, ALJ O'Brien)(DHS); FCP/140354 (Wis. Div. of Hearings and Appeals July 6, 2012, ALJ Gagnon)(DHS).

### **CONCLUSIONS OF LAW**

The Petitioner remains at the nursing home level of care as defined in the FC chapter of the Wisconsin Administrative Code.

**THEREFORE, it is**

### **ORDERED**

That the petition be remanded to the agency with instructions to continue the Petitioner's FCP from August 1, 2012 forward, in accord with the Conclusion of Law above, if she is otherwise eligible for the program. This action shall be taken within 10 days of the date of this Decision.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 1st day of November, 2012

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Debra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of Family Care Expansion, DHSDHAOFCE@wisconsin.gov - DHSDHAOFCE@wisconsin.gov v  
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The preceding decision was sent to the following parties on November 1, 2012.

Milwaukee Enrollment Services  
Office of Family Care Expansion